

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

**SUMMARY ORDER**

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 7<sup>th</sup> day of February, two thousand eleven.

PRESENT:

JOSÉ A. CABRANES,  
BARRINGTON D. PARKER,  
DEBRA ANN LIVINGSTON,

*Circuit Judges.*

UJJALPAL SINGH BHELA,  
*Petitioner,*

v.

09-4996-ag  
NAC

ERIC H. HOLDER, JR., UNITED STATES  
ATTORNEY GENERAL,  
*Respondent.*

FOR PETITIONER: Viney K. Gupta, Orange, California.

FOR RESPONDENT: Tony West, Assistant Attorney General; Mary Jane Candaux, Assistant Director; Kiley L. Kane, Trial Attorney, Office of Immigration Litigation, United States Department of Justice, Washington, D.C.

1           UPON DUE CONSIDERATION of this petition for review of a  
2 Board of Immigration Appeals ("BIA") decision, it is hereby  
3 ORDERED, ADJUDGED, AND DECREED, that the petition for review  
4 is DENIED.

5           Petitioner Ujjalpal Singh Bhela, a native and citizen  
6 of India, seeks review of the November 17, 2009, decision of  
7 the BIA denying his motion to reopen. *In re Ujjalpal Singh*  
8 *Bhela*, No. A073 669 376 (B.I.A. Nov. 17, 2009). We assume  
9 the parties' familiarity with the underlying facts and  
10 procedural history of the case.

11           The majority of the issues raised by Bhela are not  
12 properly before us. Bhela asks us to vacate his *in absentia*  
13 removal order from 1999. Under 8 U.S.C. § 1252(d)(1), we  
14 "may review a final order of removal only if . . . the alien  
15 has exhausted all administrative remedies available to the  
16 alien as of right." Bhela failed to challenge the IJ's *in*  
17 *absentia* removal order, or the IJ's denial of his motion to  
18 reopen and rescind that order, in his 2009 motion to reopen  
19 with the BIA. Moreover, Bhela did not appeal either the  
20 1999 IJ decision entering an *in absentia* removal order  
21 against him, or the IJ's denial of his motion to reopen  
22 proceedings in order to rescind that *in absentia* order.  
23 Accordingly, the merits of Bhela's *in absentia* removal order

1 are not properly before us, and, as a statutory matter, we  
2 lack jurisdiction to review that order. See 8 U.S.C.  
3 § 1252(b)(1) (requiring a petition for review to be filed  
4 within thirty days of the final order of removal); *Stone v.*  
5 *INS*, 514 U.S. 386, 394 (1995); *Malvoisin v. INS*, 268 F.3d  
6 74, 75 (2d Cir. 2001).

7 Bhela also claims, for the first time in his lengthy  
8 immigration proceedings, ineffective assistance by his  
9 former counsel, who represented him in the immigration  
10 proceedings that commenced in 1997. In addition to the  
11 statutory requirement that a petitioner exhaust the  
12 categories of relief he seeks, 8 U.S.C. § 1252(d)(1), a  
13 petitioner must also raise to the BIA the specific issue he  
14 later raises to this Court. See *Foster v. INS*, 376 F.3d 75,  
15 78 (2d Cir. 2004). While not jurisdictional, this  
16 judicially imposed exhaustion requirement is mandatory. *Lin*  
17 *Zhong v. U.S. Dep't of Justice*, 480 F.3d 104, 119-20 (2d  
18 Cir. 2007). Bhela failed to raise ineffective assistance of  
19 counsel in either his initial appeal to the BIA, or in his  
20 2009 motion to reopen with the BIA, and thus, we decline to  
21 consider this unexhausted issue.

22 Bhela further argues that the BIA abused its discretion  
23 in denying his motion to reopen. Because Bhela's motion to

1 reopen was untimely, and in his motion, he alleged neither  
2 ineffective assistance of counsel, which may have tolled the  
3 time period, nor changed country conditions, which may  
4 constitute an exception to the time limit, the BIA construed  
5 the motion as a request for it to exercise its *sua sponte*  
6 authority to reopen proceedings at any time. See 8 C.F.R.  
7 § 1003.2(a). The BIA then found that it lacked authority to  
8 reopen proceedings because Bhela had self-executed his  
9 outstanding *in absentia* removal order. The regulations  
10 provide that a motion to reopen "shall not be made by . . .  
11 [an alien] subsequent to his or her departure from the  
12 United States." 8 C.F.R. § 1003.2(d). The BIA has  
13 interpreted this provision as depriving it of jurisdiction  
14 to exercise its *sua sponte* reopening authority after an  
15 alien has departed the United States, and we have deferred  
16 to that interpretation. See *Xue Yong Zhang v. Holder*, 617  
17 F.3d 650, 660-61 (2d Cir. 2010); *In re Armendarez-Mendez*, 24  
18 I. & N. Dec. 646 (B.I.A. 2008).

19 In concluding that it lacked jurisdiction to reopen,  
20 the BIA failed to consider either Bhela's pending self-  
21 petition as the abused spouse of a United States citizen, or  
22 the special rule governing motions to reopen by those  
23 seeking relief as the battered spouse of a United States

1 citizen. See 8 U.S.C. § 1229a(c)(7)(C)(iv). However, any  
2 remand would be futile, because we can “confidently predict”  
3 that even if the agency were to consider Bhela’s motion as  
4 governed by the special rule, it would deny the motion. See  
5 *Xiao Ji Chen v. U.S. Dep’t of Justice*, 471 F.3d 315, 339 (2d  
6 Cir. 2006) (holding that remand is futile “when the  
7 reviewing court can ‘confidently predict’ that the agency  
8 would reach the same decision absent the errors that were  
9 made” (quoting *Cao He Lin v. U.S. Dep’t of Justice*, 428 F.3d  
10 391, 395 (2d Cir. 2005))). The statute governing a motion to  
11 reopen by an alien seeking relief as the abused spouse of a  
12 United States citizen provides that such a motion to reopen  
13 must be filed within one year of the final administrative  
14 order of removal. See 8 U.S.C. § 1229a(c)(7)(C)(iv)(III).  
15 Bhela was ordered removed *in absentia* in 1999, and his  
16 motion to the IJ to reopen proceedings and rescind that  
17 order was denied that same year. Thus, there is no question  
18 that Bhela’s 2009 motion to reopen was untimely even under  
19 the special rule for abused spouses. See *id.* Moreover,  
20 Bhela did not allege any extraordinary circumstances, or any  
21 extreme hardship to his children, that would excuse the one  
22 year filing deadline. See *id.*

23 For the foregoing reasons, the petition for review is

1 DENIED. As we have completed our review, any stay of  
2 removal that the Court previously granted in this petition  
3 is VACATED, and any pending motion for a stay of removal in  
4 this petition is DISMISSED as moot. Any pending request for  
5 oral argument in this petition is DENIED in accordance with  
6 Federal Rule of Appellate Procedure 34(a)(2), and Second  
7 Circuit Local Rule 34.1(b).

8 FOR THE COURT:  
9 Catherine O'Hagan Wolfe, Clerk